
(1965) 09 CAL CK 0014

In the Calcutta High Court

Case No : A.F.O.O. No. 104 of 1964 (Mandamus Appeal)

Union of India (UOI)

APPELLANT

Vs

Santi Kumar Banerjee and Others

RESPONDENT

Date of Decision : 02-09-1965

Acts Referred:

Constitution of India, 1950 — Article 226, 309
Railway Establishment Code, 1959 — Rule 9

Citation : AIR 1967 Cal 129 : (1967) 1 CALLT 376 : (1968) 2 LLJ 203

Hon'ble Judges : S.A. Masud, J;D.N. Sinha, J

Bench : Division Bench

Advocate : B.C. Mitter and B.N. Bose, for the Appellant; Nani C. Chakraborty and Anil Kr. Sen, for the Respondent

Final Decision : Dismissed

Judgement

Sinha, J.—In this appeal, the Union of India as representing the Eastern Railway, is the first appellant, and the appeal is against an order of Banerjee J., dated 21st January, 1964, made in an application by one Santi Kumar Banerjee, against the Union of India representing the Eastern Railway, and others. The facts in the application are briefly as follows: The petitioner states that he was previously in the employment of the Bengal and Assam Railway and thereafter became employed by the Eastern Railway. On 20th March, 1937 he was promoted to the rank of Ticket Collector and was at the material time holding the post of a confirmed Ticket Collector in the Eastern Railway. It is stated that since 1950 and from time to time, the Railway Board sanctioned the creation of a few upgraded posts of Ticket Collector on the scale of Rupees 200-300 and simultaneously there was a similar sanction for the creation of certain upgraded posts of Travelling Ticket Examiners, which according to the petitioner, was a separate cadre of appointment.

It is then stated that by a decision of the Railway Board the upgraded posts of Ticket Collectors were to be filled by promotion exclusively from Ticket Collectors

of the ex B. A. Railway who were confirmed against pro-partition vacancies with dates of confirmation prior to 15-8-47. Similarly it was decided that the upgraded post of Travelling Ticket Examiners would be filled by ex B. A. Railway Travelling Ticket Examiners confirmed against preparation vacancies, who were confirmed prior to 15-8-47. It is claimed that the petitioner had at the material time the requisite qualification as an ex B. A. Railway Ticket Collector confirmed prior to 15-8-47. The first grievance made in the petition is that the Eastern Railway wrongfully amalgamated the two different cadres of Ticket Collectors and Travelling Ticket Examiners, in the matter of selection to the upgraded post of Ticket Collectors and also called persons totally in-eligible for the purpose of such selection, to be candidates for promotion to the Post of the upgraded Ticket Collectors.

What happened was that 32 posts were to be filled up and 137 candidates were called up for selection, including 9 candidates who, it is said, are wholly ineligible under the rules, but were called simply on the ground that they belonged to the scheduled caste. Thereafter, an examination was held, both written and viva voce. The complaint is that this examination was not held in accordance with the rules. There is, therefore, two broad points. One is the illegal amalgamation of the two cadres and the other is the holding of the examination or test by the Selection Board contrary to the rules. The learned Judge in the court below has dealt with both the points. With regard to the first point, he has held against the petitioner and in his appeal before us the petitioner has not questioned the decision. On the second point, the learned Judge in the court below has held in favour of the petitioner and has come to the conclusion that the examination or test was not properly held. The petitioner has read to support this finding before us. Before deciding this point, we must first of all, refer to the rules concerning the holding of the examination or test. Incidentally it may be mentioned that a point has been taken by the appellant that these rules are not statutory rules. If, of course, these are merely departmental rules without statutory force, we cannot rely on them for the purpose of a writ application. Therefore, not only the relevant rules will have to be considered, but also the point as to whether they have statutory force. I shall now proceed to enumerate the relevant rules.

2. Article 309 of the Constitution gives power to the President to make rules regulating the recruitment and the conditions of services of persons appointed to public service and posts in connection with the affairs of the Union. The Railways and All India Services are matters which are Union subjects under List I of the 7th schedule. The President can make such rules until Parliament enacts a statute in respect thereof, and the President may delegate his powers in that behalf to such persons as he may direct. Under the corresponding provisions of the Government of India Act 1935 namely Section 241(2), the Railway Establishment Code was first promulgated in 1940. It was reprinted in 1951 and revised in 1959. In 1960 was published the Indian Railway Establishment Manual which now incorporates portions of the Railway Establishment Code. Under rule 156 of the Code of 1951 (corresponding to Rule 157 of the Code of 1959) the

Railway Board has been given full powers by the President to make rules of general application to non-gazetted railway servants under their control. It will be necessary to trace the relevant rules since the promulgation of the 1951 Code. In the 1951 Code, Rule 140 (Ch I) provides that the rules for the recruitment and training of non gazetted railway servants other than those mentioned therein, on Indian Railways, excluding the Accounts department, are contained in Appendix II. The rules governing the promotion of subordinate staff is contained in Appendix II-A. Clause 4 of Appendix IIA is in the following terms:

"4. Promotion.--(a) A railway servant may be promoted to fill any post, whether a selection post or a non-selection post, only if he is considered fit to perform the duties attached to the post. The General Manager, or the Chief Mining Engineer or the Head of a Department, may prescribe the passing of specified departmental or other tests as conditions precedent to an employee being considered fit to hold specified posts; such rules should be published for the information of the staff concerned.

(b) Promotions shall be made without any regard for communal considerations or racial discrimination."

3. The Railway Establishment Code 1951 was revised and republished as the Indian Railway Establishment Code Vol. I in 1959. It was issued by the President in exercise of the powers conferred on him under Article 309 of the Constitution. In the prefatory note to the said publication, it has been stated that the Appendices II and II-A mentioned above have been embodied in the Indian Railway Establishment Manual. This was done in order to avoid the code being too bulky. The Indian Railway Establishment Manual was published in 1960. In the 1959 Establishment Code, Rule 137 (Chapter I) provides that the rules for the recruitment of non-gazetted railway servants are contained in Chapter I of the Indian Railway Establishment Manual. The rules governing the promotion of subordinate staff are contained in Chapter II. The relevant rules with which we are concerned are based on Appendix II-A of the Indian Railway Establishment Code 1951 as modified by several directives of the Railway Board. These are all mentioned in the letter written by the Chief Personnel Officer, which together with its enclosures has been set out in annexure "D" to the petition, at pages 31 to 34 of the paper book. The relevant rule is rule 9 in Chapter II of the Indian Railway Establishment Manual which describes the procedure to be adopted by the selection board in filling up selection posts. The relevant rules for our purposes are contained in Clauses (c), (d), (e), (f), (h) and (k) which are set out below:

"(c) The selection board will examine the service record and confidential reports (if kept) of the staff eligible. Ordinarily only railway servants in grades two grades below the grade for which the selection is held will be eligible for consideration. Persons employed against fortuitous short-term or stop-gap promotions to the eligible grades made otherwise than in accordance with the regular approved method of promotion will not be eligible for consideration.

(d) Eligible staff upto four times the number of anticipated vacancies will be called for written and/or viva voce tests. If this number can be obtained in the grade immediately lower, there would be no need to go to the grades further lower down. It is desirable to hold written tests as part of a selection in respect of all Initial selection grade posts in the different channels of promotion, but in every case a viva voce test shall be held.

(e) Selection should be made primarily on the basis of overall merit, but for the guidance of selection boards the factors to be taken into account and their relative weight are laid down below-

Maximum marks : 100

(i) Record of service ... 20

(ii) Seniority ... 30

(iii) Professional ability and capacity to do the particular Job ... 30 To be suitable, a person must secure 18 Marks under this head.

(iv) Personality, address and Leadership ... 20

(f) The importance of an adequate standard of professional ability and capacity to do the job must be kept in mind and a candidate who is below the desirable minimum standard in this respect may not be placed on the panel even if on the total marks secured he qualifies for a place. Good work and a sense of public duty among the conscientious staff should be recognised by awarding more marks both for record of service and for professional ability.

(k) After the competent authority has accepted the recommendations of the selection board, the names of the candidates selected will be notified to the candidates".

4. Before I deal further with the rules, and examine the question as to whether the selection has been in accordance with the same, it will be convenient here to deal with the question as to whether the rules have any statutory force. I have already mentioned that originally, the Railway Establishment Code was made u/s 241(2) of the Government of India Act, 1935. This has been continued in the subsequent codes and the Establishment manual under the authority of Article 309 of the Constitution. Under Article 309, the President has been given the right to delegate his powers and by rule 156 contained in the 1951 Code (corresponding to rule 157 in the 1959 Code) the Railway Board has been given full power to make rules of general application to non-gazetted railway servants under their control (with which we are concerned in this case.). Therefore, the rules made by the Railway Board, which are made effective by issuing circulars or letters have statutory authority. It is argued that since the Establishment Code of 1959 does not contain appendix II-A but it is embodied in the Indian Railway Establishment Manual published in 1960, it has ceased to be any part of the rules. This argument cannot be accepted. As pointed out above, the Code of 1951 was

reprinted in 1959 but Appendix II-A was incorporated in a separate publication namely, the Indian Railway Establishment Manual, in order to avoid bulk. That does not make the rules contained in Appendix II-A which have been embodied in Chapter II of the Establishment Manual, of less statutory effect. In fact, the concordance set out in Appendix 10 of the Establishment Manual shows that the provisions contained in Chapter II are based on orders of the Railway Board. In fact, the Establishment Code of 1959 itself shows that the Establishment Manual also contains rules. For example, rule 137 states that the rules for the recruitment of non-gazetted railway servants are contained in Chapter I of the Indian Railway Establishment Manual. The discipline and conduct rules applicable to rail-way employees are neither contained in the code nor in the manual but have been independently published. Therefore, the mere fact of independent publication do not make the rules of any less statutory effect. I shall now examine the procedure that was actually adopted in the present case for the selection of candidates in order to see whether the same has been done in conformity with the rules.

5. The first thing to be considered is the number of posts to be filled up and the number of candidates that were examined for selection. It appears that 32 posts were to be filled up. The details are set out below:--

Posts upgraded :

T. C. ? 14

T. T. E. ? 8

Vacancies :

Existing ? 2

Anticipated ? 8

Total ? 32

6. According to the rules, four times the number of anticipated vacancies were to be culled, that is to say, $32 \times 4 = 128$. To this was added 9 more candidates for the following reason:

According to the directions of the Railway board, a certain portion of vacancies in promotional grades had to be reserved for members of the scheduled castes and scheduled tribes. After it was decided to call 128 candidates a representation was received from members of the scheduled castes and scheduled tribes and it was found that out of 10 vacancies three posts were required to be reserved for them. No reservation was required to be made against posts upgraded as a result of the new dealing. In order to carry out the directions of the railway board, $3 \times 4 = 12$ candidates from the reserved communities were required to be called. According to the directions of the railway board, in the case of reserved communities, candidates could be called even from two grades below the selection grades. Only 9 candidates were found available, and only one of them

was in the grade of Rs. 100-185. The rest were from the next lower grades of Rupees 100-160. The total number of candidates called were, therefore, $128 + 9 = 137$. It is not very clear from the materials placed before the court as to the mode of reservation of seats for the scheduled castes and scheduled tribes as directed by the Railway Board. But assuming that a proportion of seats was to be reserved, the learned Judge in the court below has rightly pointed out that the reservation had to be made out of the 10 vacancies and the vacancies reserved for the reserved communities would be included within the number of 32 posts to be filled up, and the total number of candidates called would still be 128. There is no justification for adding 9 to the number 128 and calling 137 candidates. That would be on the basis of a partial duplication of the vacancies. In fact, before the learned Judge supplementary affidavits were filed and Mrs. Lakshmi Menon, the Assistant Personnel Officer, Eastern Railway. Sealdah Division. was called as a witness on behalf of the railways. She was unable to sustain the number 137, but ultimately agreed that the number should have been 128. She tried at one time to say that the rules provided that not less than four times the number of vacancies should be called for a selection test. She could not substantiate it from the records. 1 now come to the next defect that has been established in the method of selection. It appears from Clause (e) of Rule 9 set out above, that there were four headings to be considered in the selection, the totality of marks being 100 It has been provided that there should be a written test as well as a viva voce test The rules provide that while it is desirable to hold written tests, a viva voce test should be held in every case. Looking at the items in Clause (e), it is obvious that items I and II admit of no written or viva voce tests. It will depend on the records Item III would admit of both written and viva voce test, while it is clear that item IV must be a viva voce test What actually was done in this case was that under item III the candidates were asked to give a written test. A sample question paper will be found at page 168 of the paper book. It will show that there were two questions and the total marks were 30; the question No. 1 bearing 16 marks and the question No. 2 bearing the remaining 14 marks. The time allowed to answer the question paper was one hour After the candidates had sat at this written test, a very curious procedure was adopted. The candidates were asked to take an oral test. Now if this was a viva voce test under item IV for the purpose of finding out the personality, address and leadership of the candidates, bearing 20 marks, there would be nothing to say. What happened, however, was that the authorities unilaterally split up 30 marks under item III, allotting 15 to the written test and 15 to a viva voce test. Since admittedly there was only one viva voce test, and it is claimed that it was under item III, there was no test at all under item IV. Indeed. Mr. Mitra argued that it was not necessary to hold a test under Item IV at all, because the selection board could, by looking at the candidates, decide about their personality, address and leadership First of all no such thing has been mentioned either in the pleadings or in the oral evidence of Mrs Menon, and I should think that the members of the selection board must be supermen if just by looking at 137 candidates they could allot competitive marks not only as to their personality, but

also to their address and leadership. It is impossible to accept this argument. On behalf of the appellant No. 1, this curious conduct on behalf of the members of selection board has been sought to be explained by saying that a viva voce had to be taken and under item III the selection board was justified even in unilaterally splitting the number between a written test and a viva voce test. I agree with the learned Judge in the court below that this explanation is wholly unacceptable. There is no doubt that under any of these items there could be a written and a viva voce test, but it is not possible to ask candidates to give a written test by answering a question bearing 30 marks and then to split it up unilaterally into a written and a viva voce test. It must be noted that there is a note under item III to the effect that a person must secure 18 marks out of 30 marks to be suitable. If the authorities were going to scale down 30 marks to 15 marks, which is less than 18, then the candidates should have been given clear notice of it. Again, if the viva voce test was held under item III, then no test was at all held under item IV, and the rules were not complied with. Although the case of the appellant No. 1 is that the selection board made this unilateral alteration, no member of the selection board was called to give evidence and the Assistant Personnel Officer who had sworn affidavits and gave evidence had no personal knowledge of this fact, nor could she produce any records to support the statement. Her evidence was that since 30 marks had been reduced to 15, this is what must have happened. It is not possible to accept such evidence.

7. The result is, that we find that the selection test has contravened the provisions of Rule 9 in two material respects. Firstly, that the number of candidates called were more than provided for in the rules and secondly, that the selection board has not followed the provisions of Clause (e) of Rule 9. The first answer that is given on behalf of the appellant is that these provisions contained in Rule 9 are not mandatory but directory. The general rule which has been laid down in *Montreal Street Rail Co. v. Normandin* (1917) A. C. 170: (AIR 1917 PC 142) is that the practice has been to construe provisions as no more than directory, if they relate to the performance of a public duty, and the case is such that to hold null and void acts done in neglect of them would work serious general inconvenience, or injustice, to persons who have no control over those entrusted with the duty, without at the same time promoting the main object of the legislature. Thus, procedural defect and non-compliance with formal requirements have been held as violation of provisions which are directory and not mandatory.

Each case however has to be judged on its own merits. Rule 9 is based on directives of the Railway Board and the Railway Board has the power to make rules for the filling up of selection posts of non-gazetted servants. In fact, the provisions of Rule 9 can be traced back to the railway board's letter S. R No. 3481 dated 8th October, 1958. It is argued that while other rules lay down what should be done by the selection board, Clause (e) provides that selection should be made primarily on the basis of over-all merit, but "for the guidance of the selection board" certain factors were to be taken into account and their relative

weights were laid down by the Railway Board. It is argued that if this is merely for the "guidance" of the selection board, it is directory and not mandatory. So far as clause (e) is concerned the primary provision is that the selection should be made on the basis of over-all merit. After having stated this, the Railway Board has stated that certain factors were to be taken into account for the guidance of the selection board and has also laid down their relative weights. So far as the factors and their relative weights are concerned, it appears to me that the provisions are directory because they are only given for the "guidance" of the selection board. In such cases, however, it is not the law that the authorities are entitled to act arbitrarily. It has been laid down in *Cullymore v. Lyme Regis Corporation* (1961) 3 Y. L. R. 1340 as follows:

"Let me turn to the second question. It is undisputed in law that if these be mere duties and though, accordingly, the provisions as to their exercise are to be regarded as directory, it is sufficient that there has been sufficient compliance with those directions".

Thus, in the case of mandatory rules, strict compliance is necessary, while in the case of directory rules what is still required is substantial compliance. They cannot be entirely ignored.

8. Coming back to the facts of this case, it can be said that the selection board which was dealing with the rules has substantially complied with the rules? The railway board has laid down that in judging over-all merit certain factors were to be taken into account. It may be open to the selection board to take other factors into account, but they cannot omit one of the factors that have been laid down by the Railway Board, nor could they, by taking into account one of the factors laid down by the Railway Board, ignore the weight allocated to it by the Railway Board. Nor could they ignore a factor altogether. That would be evolving a new rule altogether, which the selection board is not competent to do. From this point of view, we find that no test was at all held with regard to item IV namely, personality, address and leadership. In other words, this factor has been entirely ignored. On the other hand, item III was in fact taken into account. In doing so, the selection board represented to the candidates that the written test would have 30 marks. This was not unlawful because this was exactly the marks allotted under item III. If the written test was held under item III with 30 marks and the viva voce test was done under item IV allotting to it 20 marks, everything would have been all right.

But the selection board proceeded on an arbitrary basis and having allotted 30 marks to the written test, they arbitrarily and unilaterally split it up into two parts, allotting 15 marks to the written test and 15 marks to the viva voce test. In my opinion, what actually happened was that the written test was held under item III and the viva voce test was held under item IV, but later on there was an arbitrary sub-division of marks under item III ignoring item IV altogether. It is suggested that this was done because the members of the selection board favoured certain candidates and they would not have succeeded unless marks

under item III were manipulated. That there must have been something behind the scenes is obvious, but I am not prepared to go to the extent of saying that this particular charge has been proved. Be that as it may, the result is that the selection board, in following the directions of the Railway Board, has not substantially complied with the same and has acted arbitrarily and in that way failed to carry out their public duties. Rules have not been complied with. Now the question is whether under such circumstances an application lies in the writ jurisdiction.

It has been held by the Supreme Court in the State of Mysore Vs. M.H. Bellary, that breach of the statutory rules framed under Article 309 of the Constitution entitled a person affected, to have recourse to court by way of a writ petition. See also The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya, .

9. For the reasons aforesaid, it must be held that the learned Judge in the court below has come to the right decision and therefore, the appeal should be dismissed. There will however, be no order as to costs.

Masud, J.

10. I agree.